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Thank you for contacting the Chapin Law Firm, LLC regarding estate planning information and options. There are many misleading or faulty conceptions concerning wills and estate planning such as - "wills avoid probate," "my will will dispose of all of my property," "the law will take care of distributing your property," "I don't have a large enough 'estate' to bother with a will," "anyone can write a will; you just say who you want to get what and sign it" and so forth. This handout attempts to answer some of the common questions related to Will, Trusts, Health Care and Financial Powers of Attorney, Living Wills and the Probate Process. This handout is not intended to be a substitute for legal advice. Please contact the Chapin Law Firm, LLC if you have any questions and we will be happy to assist you.

COMMON QUESTIONS AND ANSWERS ABOUT WILLS

What is a will?

A will is a written instrument (in proper legal form) specifying the disposition of your probate assets after death. You must sign the will before two qualified witnesses.

What property does a will govern?

A will only governs disposition of property passing through probate. Probate property consists of property owned by a decedent at death, except it does not include property owned in joint tenancy with another person or property having a beneficiary designation (such as life insurance, individual retirement accounts, retirement plans, and "payable at death" designations on financial institution accounts). Joint tenancy property and property having beneficiary designations will pass to the surviving joint tenants and beneficiaries at death outside of the probate process. Such property thus will not be governed by a will.

What happens if I don't have a will?

Your probate assets will pass to your heirs at law by a statutory process known as "intestate succession." For example, if you are married and have no children, your spouse is your sole heir. If you have children and no spouse, your children are your sole heirs. If you are married and have children, your spouse is heir to half of your assets, and your children are the heirs to the other half. If you have no surviving spouse or children, the Kansas statutes provide for other more remote relatives to receive your property. If you have no heirs and no will, you assets will "escheat" to the state. In addition, in the absence of a will, the court will decide who is to serve as administrator (must be a Kansas resident) of your estate and who is to be guardian and/or conservator should you have any minor children.

Who needs a will?

Most persons who have an estate need a will. You have an estate, if you own a home, car, items of sentimental or financial value, or maintain a bank account, you have an estate. While the intestate succession law provides for distribution of your property in the absence of a will, this distribution may not reflect your wishes. Further, you can provide for special circumstances in your will that would go unheeded otherwise, such as naming a guardian and/or conservator for

your minor children, naming your executor (who need not be a Kansas resident) to manage your estate; establishing trusts for minor children or incapacitated persons; protecting those who have trouble handling money from their creditors or even from themselves; making provisions for your children in a remarriage situation; passing property to friends who are not heirs; avoiding disruption and loss of your business after your death; helping to reduce or eliminate death taxes; and the list goes on. An attorney experienced in estate planning can help you provide not only for the expected but will help you address situations you may not have considered.

Does a will create increased probate expense?
No, and it may even save probate expense because less court involvement is required. If there are probate assets, a court must either rule on the validity of the will or, if there is no will, determine who are the legal heirs and distribute the property accordingly. There are generally costs incurred either way, but careful estate planning through a will can save your estate and beneficiaries substantial administrative costs and taxes.

Can a person leave property in any manner he or she wishes in a will?
Normally yes, except that you may not exclude your spouse without his or her consent. You may exclude your children if you wish.

Is joint tenancy a substitute for a will?
No, although joint tenancy may be an alternative means of disposing of particular assets at death, it is not a substitute . Upon a joint tenant's death, the surviving joint tenant or tenants automatically own the joint tenancy property. Assets owned in joint tenancy are not probate assets and are not governed by a will. During your lifetime, your control over the property is complicated by the fact that other joint tenants also have a present ownership interest in your property. Transfers of the property normally require the approval of the other joint tenants. The property may also become subject to claims of the creditors and spouses of other joint tenants, such as in a divorce. It also can cause adverse gift or income tax consequences. Further, because the property passes outright to surviving joint tenants at death, it is not appropriate in circumstances where it is more advisable to place the property in trust to protect beneficiaries. It may also be inappropriate if the surviving joint tenant is incapacitated, in a nursing home, or otherwise would qualify for government assistance. Moreover, joint tenancy property does not escape estate and inheritance taxes, and the opportunity for estate planning to minimize these taxes can be lost. Owning property in joint tenancy is a device for passing property at death, but should not be relied upon without expert legal counsel.

Is a beneficiary designation a substitute for a will?
No, although beneficiary designations are an alternative means of disposing of particular assets at death (such as life insurance, individual retirement accounts, and retirement plans), it is not a substitute for a will. Beneficiary designations do not give any present ownership interest to the beneficiary, and can be changed without the consent of the beneficiary, unless you are married and the beneficiary designation relates to retirement benefits. Although these are advantages, beneficiary designations have most of the other problems associated with joint tenancy ownership.

Is a revocable living trust a substitute for a will?
Revocable living trusts are a means of avoiding probate, as the trust owns the decedent's assets, and not the decedent. Consequently, such assets are generally not governed by the probate process. The trust acts in the same manner as a will following death, i.e., directing the management of trust property and the manner is which trust assets are to be disposed. Revocable

living trusts have advantages in avoiding probate in that they save costs and provide privacy in keeping the extent of your property and its disposition from being a matter of public record. However, they are not appropriate in many circumstances, as they are initially more expensive, and there is some inconvenience in having to currently retitle assets in the trust. Even should one utilize a revocable living trust as a primary instrument for disposing of property at death, a will should also be executed in the event that all assets are not properly titled in the trust during your lifetime. This will is called a "pour over". It provides for disposition to the trust with respect to any assets that must go through probate due to ownership remaining in the decedent at death.

How long is a will valid?
A will is valid until it is amended or revoked by you in the manner provided by law, or as provided by law in certain other circumstances. For example, if you marry and have children, a prior will is automatically revoked by operation of law. In like manner, if you divorce, any provisions in a prior will for your spouse are considered revoked.

I have a will. Should it be reviewed?
Changes in your family, finances, your state of residence, certain state or tax laws, or your intentions with respect to your property may make it advisable to change your will from time to time. It is recommended you have your attorney review your will periodically or in the event of any such change in circumstances.

Is a will expensive?
Wills can be quite inexpensive, and costs vary depending on the complexity of the will and the extent of your assets. The expense is normally minimal compared to the benefits you and your beneficiaries receive from having a well devised estate plan.

COMMON QUESTIONS AND ANSWERS ABOUT LIVING TRUSTS

What is a trust?
A trust is an agreement between you (the settlor) and another individual or entity (the trustee) who holds legal title to property and manages it for the benefit of one or more individuals or organizations named in the trust (the beneficiaries). A trust can be created in your will (a "testamentary" trust) or can be created during your lifetime (a "living" trust). The terms of a living trust, which can be very flexible, are set out in a trust agreement.

What kinds of living trusts are there?
A living trust can be either revocable or irrevocable. A revocable trust can be changed or terminated by the one setting up the trust at any time before that person's death or incapacity. An irrevocable trust is permanent, can seldom be changed or terminated, and has special tax treatment. An irrevocable trust is permanent and can seldom be changed or terminated. Absent unusual circumstances, most living trusts used as one's primary estate planning document are revocable. A living trust can be established and all of your assets transferred into its ownership immediately or can be established as a "standby trust," ready to receive assets if the settlor becomes disabled. In such cases, someone needs authority to transfer the assets, usually as agent under a special durable power of attorney.

Does a living trust replace a will?
Not completely. If all your property is either titled in your living trust at the time of your death or has your trust named as the beneficiary, none of your property would go through the probate process. However, it is easy to overlook an asset that you intend to put in trust, and you may

acquire additional property prior to your death, such as inheritance. You might not have time to transfer that additional property to your trust. Your trust might also have been terminated, either voluntarily or involuntarily, before your death. Without a will, any of such overlooked property would pass through probate under the laws of the state rather than to the loved ones or charities of your choice. Therefore, a will that "pours over" such probate property to your trust is recommended, no matter how carefully you have transferred your assets in trust.

Can you do the same things in a living trust as you can in your will?
Yes. You can instruct your trustee to pay your bills at death, leave burial instructions, sell your property and designate a guardian and conservator for your minor children, just as you would instruct an executor under a will. You can also provide for longer-term trusts for the care of loved ones or to benefit charities without leaving property outright to them at your death.

Do you have to be wealthy to set up a trust?
No. You should consider the complexity of your estate, your need for investment management, the availability of a reliable initial or successor trustee, and your family situation rather than wealth when you compare the advantages of a trust against a traditional will. As with any estate planning decision, you should get specific advice tailored to your needs and other circumstances unique to you and your family.

Who should be your trustee, and how much will it cost?
Naming a trustee requires careful thought. Most people will be trustees of their own living trusts, but a successor will have to be named for continuation after the death or disability of the settlor or if you decide you no longer want to manage your assets.

You might prefer to name another person, family member, or a professional trustee such as a bank, attorney, trust company, as a co-trustee or sole trustee. If you name a family member as the trustee, you may create a taxable situation you had not anticipated if there are no limitations on their trust powers. In all events, a properly drafted living trust would require the trustee to defer to your wishes as to the investments and distribution from the trust for as long as you are competent.

Whether an individual or a professional trustee is desirable depends entirely on the circumstances. A professional trustee is often able to offset a significant portion of its fees through increased yield. Further, most professional fiduciaries are bonded, are experienced in the complexities of trust management, offer greater financial security, objectivity and continuity of management. On the other hand, and individual may be more familiar with your family situation and may be less expensive.

Trustee's fees vary depending on services performed, the value of the trust, the nature of trust assets and the party performing the services.

What are the features of a living trust?
Probate Avoidance
Assets transferred to the trust are not subject to probate. You can save expenses and fees because the trust contains special instructions for distribution of your assets after your death without court proceedings. This feature is particularly attractive when the trust owns real estate in more than one state or jurisdiction because it avoids multiple probate proceedings.

Personal Tax Planning
A trust, whether set up during your lifetime or in your will, may be structured to save taxes, preserving more for your loved ones at your death.

Financial Management During Your Lifetime
Your named trustee can manage assets, pay your bills, run a business for you, take care of personal needs - whatever you direct in your trust agreement.

Protection for Inexperienced Beneficiaries
Although a revocable living trust cannot shield your assets from your own creditors, you can set up a trust to protect your loved ones from their creditors, spouses or inexperience.

Flexibility
A revocable living trust can be changed as circumstances and lifestyles change.

Privacy
The terms of a living trust and the value of your estate are not subject to public scrutiny.

Financial Management in the Event of Incapacity
A trustee can collect income and pay expenses in the event of incapacity. Without a trust or power of attorney, an individual may be subject to court proceedings to determine if he or she is competent, and may have someone not personally known named as conservator. If a conservatorship were needed, all further financial dealings would be subject to court (and therefore public) scrutiny.

More Certainty as to Property Distribution at Death
By insuring that all property is properly titled in a living trust, there is greater assurance that all of your property will be governed by its terms. Since wills only govern probate assets, assets that pass outside the probate process such as those held in joint tenancy or under beneficiary designations are often overlooked.

What are the disadvantages of a living trust?
Drafting Expenses
Your attorney will charge a fee to draft your trust. As living trusts contain provisions applicable during lifetime as well as at death, this fee is generally more expensive than the fee for a will. There may also be additional costs and legal expenses in titling your assets over to your living trust. There will also be charges associated with drafting a "pour over" will. However, these wills are not as complicated as trust agreements and probably will not substantially increase drafting costs.

Administration Expenses
Should you choose a professional fiduciary during your lifetime, there will be fees for administering the trust. Should you wish to manage the trust yourself, you may serve as your own trustee and avoid these fees.

Potential Loss of Some Income Tax Advantages
Some income tax advantages after your death may be lost by using a living trust rather than having your property go through probate, such as the ability of your estate to elect a separate tax year and to use certain state losses for income tax purposes. These income tax disadvantages, however, are usually insignificant, particularly when balanced against the increased costs of the

probate process. The income tax advantages of having property go through probate would also be lost by the use of joint tenancy and other probate avoidance devices.

Increased Paperwork
A trust may involve more "paperwork" than when property is owned individually. For instance, if you are not the trustee of your own trust, the trust may be required to file a separate tax return, although no additional income taxes would be owing. The trustee is usually directed to account to the grantor or beneficiaries. In addition, extra documents ordinarily must be prepared to transfer title to the trust.

Do you give up control of your property in a living trust?
As long as you are competent, you can retain as much control as you desire. You can change trustees, change the provisions of the trust, direct your trustee on investments and distributions and even terminate a living trust if you are unhappy with the arrangement.

How do I set up a living trust?
A living trust is a legal document with complex property, estate and tax consequences and should not be entered into without consideration of your overall estate-planning objectives. People are sometimes encouraged to set up trusts without advice from their attorney, but this is not advisable. Your loved ones may not be properly protected and you may lose the opportunity for tax planning and other advantages if the trust document, is not appropriately drafted. An attorney experienced in estate planning is the person best equipped to analyze your estate and discuss all appropriate estate planning devices. If a living trust is appropriate you, your attorney will be able to prepare a trust document that addresses your situation. For many, a living trust is the best estate-planning vehicle.

COMMON QUESTIONS AND ANSWERS ABOUT PROBATE AVOIDANCE DEVICES

When Probate Is Necessary

If an individual dies owning titled property which is not held in joint tenancy and which does not have a valid beneficiary designation, probate normally will be required. Titled property is property having a written instrument establishing its ownership. For example, deeds specify the ownership of real estate. Likewise, stock is a titled asset because the owner is specified on a stock certificate. Other examples of titled property include bank accounts, bonds, mutual funds, and motor vehicles, all of which have written evidence of ownership.

Probate is normally required for titled property following the owner's death because a formal procedure is necessary to determine the name of the person or entity who or which succeeds to its ownership. Without probate, the property would remain titled in the decedent's name, and no one would have the legal authority necessary to manage, sell, mortgage, or otherwise encumber the property.

Third parties who hold the titled records on probate property of the decedent normally will not agree to transfer it absent a probate procedure. For example, let's assume a decedent's bank account is to pass to the decedent's son under the terms of the decedent's Will. Nonetheless, a bank normally would not turn the balance of the account over to the son except pursuant to a probate proceeding. Otherwise, the probate court might find that the Will is invalid or that a later Will of the decedent revoked the Will shown to the bank. In that event, the probate court could find that the bank account passed to someone other than the decedent's son. If the bank had

previously paid the balance of the account to the decedent's son, the bank could be held liable to restore the bank account balance with its own funds and pay it over to the person the probate court determined inherited the account. Because there is no record title for certain types of personal property, such as clothing, furniture, jewelry, and livestock, probate would generally not be required for non-titled property as long as family members agreed on its distribution following the owner's death.

A decedent who dies with probate property can die either with or without a Will. The person or entity named in the Will to administer the decedent's property is called an Executor. When a person dies without a Will, referred to as "intestate," property titled in the decedent's name passes to the decedent's "heirs at law." Kansas intestacy laws determine the decedent's "heirs at law" and the amount of the decedent's estate that each heir receives. A representative, called an Administrator, is appointed by the probate court to administer the estate of a person dying without a Will.

Probate of a Will is necessary not only to provide for successor ownership of the decedent's probate property, but also to establish: (i) the validity of the Will; (ii) the portion of the decedent's property that must pay administrative expenses and claims; (iii) that the Executor named under the Will is a fit and proper party to administer the estate; and (iv) that the decedent's property is distributed to the parties named in the Will in the shares and manner specified in the Will.

Persons who do not desire for probate property to pass under intestacy laws, or who wish to vary the shares or manner in which their heirs would otherwise take under intestacy laws, should execute a Will. When a decedent dies with a Will, referred to as "testate," the provisions of the decedent's duly probated Will determine the amounts and manner the property titled in the decedent's name will be distributed to beneficiaries. Other benefits of having a Will as opposed to dying intestate include being able to: (i) name the Executor to administer the estate; (ii) ease the burden and costs of administration of the estate by waiving court approval of certain actions taken by the Executor (such as the sale of real property); (iii) waive the posting of bond by the Executor; (iv) name a guardian and conservator for minor children; (v) create trusts for beneficiaries if desired; and (vi) provide for estate and income tax planning.

Probate Avoidance Devices

Probate avoidance devices allow an individual to legally pass title to property without the necessity of a probate procedure. This creates certain benefits. First, they save the time and expense of a probate proceeding. Second, unlike probate records which are open to the public and disclose the nature and beneficiaries of the decedent's estate, most probate avoidance devices are not a matter of public record. Third, probate avoidance devices involve a far less cumbersome procedure to transfer title following death than probate.

There are three types of probate avoidance devices. They are joint tenancies with rights of survivorship, beneficiary designations, and Revocable Trusts.

1. Joint Tenancies with Rights of Survivorship

An individual may avoid probate by titling property with another person(s) as "joint tenants with rights of survivorship." If such ownership is not clearly indicated between co-owners, the property will not be titled in joint tenancy and each co-owner's interest will pass through probate upon a co-owner's death.

Under joint tenancy law, upon a joint tenant's death the property interest of the deceased joint tenant immediately passes to the surviving joint tenant(s). To establish ownership, the surviving joint tenant(s) simply need to file a death certificate of the deceased joint tenant with the Register of Deeds office with respect to real estate, and present the death certificate to third parties holding the title records with respect to personal property. If there are more than two joint tenants on the title, the surviving joint tenants will continue owning the entire property in joint tenancy with each other.

Joint tenancy ownership is beneficial in that it is not only simple and inexpensive to create, but also to establish ownership in the surviving joint tenant or joint tenants after death. Joint tenancy ownership avoids the cost and inconvenience of probate because the succession of ownership at death in the surviving joint tenant is automatic under joint tenancy law.

Notwithstanding its benefits, joint tenancy ownership has several disadvantages. Setting up joint tenancy ownership with individuals other than a spouse can be financially hazardous. Joint tenants become co-owners and obtain full rights of co-ownership. This means that joint tenancy property is subject to the claims of co-owners, the creditors of co-owners in the event of a garnishment or attachment, and spouses of co-owners in the event of a divorce.

In addition, if joint tenancy property consists of an account with a credit union, savings and loan, or bank, normally any joint tenant can withdraw the entire balance of the account at any time. The possibility of a joint tenant making a withdrawal increases if the creator becomes incapacitated or dies. If there are more than two joint tenants and one of them withdraws the entire balance in the account, the other joint tenant or joint tenants on the same account would be disinherited.

If an account owner wants to put another person on a financial institution account to pay bills, sign checks, etc. on the account owner's behalf, the problem of potential withdrawal can be minimized by adding the person as an additional signatory, rather than as a joint tenant. This also prevents such person from becoming a co-owner, and thus the account does not normally become subject to the claims of such person's creditors and spouse. Alternatively, if the account owner wants the account balance to pass to another person upon the owner's death, but does not want to give the other person present ownership rights in the account, the owner can use a payable on death ("POD") beneficiary designation, as discussed in the next section.

Joint tenancy ownership also requires the signatures of all joint tenants (and their spouses with regard to real estate) if the property is to be sold, transferred, mortgaged or otherwise encumbered. This can pose not only logistical problems, but can be particularly problematic if all parties are not willing to execute the necessary documents or if a joint tenant becomes incapacitated.

One of the most significant problems of joint tenancy ownership arises because joint tenancy ownership does not provide for coordination of affairs following the creator's death. When the creator of a joint tenancy ownership dies, no authority has been reposed in any person or entity to sell property, pay the decedent's debts, or file the decedent's final income tax return or any required Federal or state death tax returns. This problem is much greater in circumstances where an unmarried parent with more than one child has placed property in joint tenancy. Family disharmony may result and disagreements over coordination of the estate can result in substantial legal expenses and delays. These disagreements often become particularly acute with regard to the distribution of non-titled personal property, such as jewelry, furniture and other personal effects. Placing titled property in joint tenancy will not govern the disposition of non-titled

personal property following death. Such disagreements can be mitigated, if not completely avoided, by planning for the disposition of one's estate under a Will or Revocable Trust, as an Executor or Trustee is named to coordinate the affairs of the decedent's estate.

Another potential problem arises because joint tenants may not die in the anticipated order. For example, if joint tenancy ownership is established as part of an estate plan to pass property to a parent's children upon the parent's death, a child's family would be unintentionally disinherited if the child predeceased the parent.

Even if all children survive their parents, unless all children are joint tenants on property placed in joint tenancy, the parent's estate plan still may be distorted. The surviving joint tenant child or children succeed to the ownership of the parent's interest in the joint tenancy property in addition to whatever the surviving joint tenant may receive from the parent's probate estate. For example, if a parent executes a Will giving his or her two children an equal share of the parent's estate, and the parent titles a property in joint tenancy with only one of the two children, the child whose name is on the joint tenancy will receive more than the other child upon the parent's death. In addition, the shares of the children who take property outside probate may be enhanced with respect to the children who take under the Will because property passing outside probate is generally not primarily liable for death taxes, the decedent's debts and taxes, or the costs of post-death administration, and there may not be an effective legal means of enforcing payment against a surviving joint tenant.

As another example, a parent may create a joint tenancy with one child on one asset and a joint tenancy with another child on an asset of equal value. If the parent would have died on the date the joint tenancy was established, the two children would have received equal shares of the parent's estate. However, variances in investment returns and changes in property values will almost always result in the two children receiving different proportions of the parent's estate when the parent dies. Moreover, if the parent sells an asset or the asset is sold by the parent's legal representative (e.g., a conservator or agent under a financial power of attorney) following a disability, the child named as a joint tenant on that asset would be disinherited.

Joint tenancy ownership between non-spouses can also cause adverse gift and income tax consequences. The act of naming a person as a joint tenant is normally a gift unless the other joint tenant or joint tenants either paid full consideration for a proportionate interest in the joint tenancy property or the joint tenancy is revocable, such as a joint tenancy account in a bank, savings and loan, or credit union. These accounts are normally revocable because any joint tenant, including the creator, can withdraw the entire account at any time. Although a donor does not incur a gift tax for a gift to a spouse, gifts to other parties, to the extent of their undivided share of the joint tenancy property, constitutes a taxable gift if the gift exceeds the annual gift tax exclusion.

Adverse income tax consequences may also result if a personal residence is placed in joint tenancy ownership with someone other than a spouse. The Taxpayer Relief Act of 1997 grants an exclusion of gain on the sale of a personal residence up to the amount of $500,000 for married couples, or $250,000 for single individuals. However, placing a personal residence in joint tenancy ownership jeopardizes the exclusion because the exclusion is not available for the interests of joint tenants who do not reside in the residence.

Joint tenancy ownership also passes the title to property outright to joint tenants. As noted above, this is frequently undesirable if the joint tenants are too young to manage the property or are

financially irresponsible. If a surviving joint tenant was a minor, a conservatorship through the courts would have to be created. Even if the surviving joint tenants are of substantial and financially mature and responsible, outright ownership subjects the property to the claims of their spouses and creditors, and places the property in their estates for Federal and state death tax purposes. It could also disqualify a joint tenant from available governmental resource benefits such as Medicaid and Supplemental Security Income (SSI). Normally, all of these problems can be minimized by leaving property in trust for a beneficiary instead of outright.

For the foregoing reasons, joint tenancy ownership is generally not desirable as a probate avoidance device between non-spouses. Even between spouses, joint tenancy ownership can cause a number of similar problems. For example, as joint tenancy property passes outright to a surviving joint tenant and not in trust, it subjects the joint tenancy property to the surviving spouse's potential mismanagement, to the claims of the surviving spouse's creditors, and to the claims of a subsequent spouse upon a remarriage. Spousal joint tenancies also cause potential Medicaid eligibility problems for the surviving spouse if the surviving spouse needs long-term nursing home care, as assets left outright to the surviving spouse will be considered for Medicaid eligibility. In addition, the total estate of both spouses would be subject to potential estate tax liability upon the surviving spouse's death if the total estate of both spouses exceeds the Federal estate tax applicable exemption amount.

Even though joint tenancy ownership between spouses avoids probate upon the first spouse's death, probate would still be required upon the surviving spouse's death unless the surviving spouse subsequently creates a Revocable Trust, puts the property in joint tenancy with others, or uses beneficiary designations to dispose of all titled property. If the creator of the joint tenancy and his or her spouse die simultaneously, probate also would normally be required because there would be no surviving joint tenant. In the event of simultaneous death, one-half of the joint tenancy would pass through each spouse's probate estate.

In short, joint tenancy ownership creates many potential problems. These potential problems can be mitigated, if not entirely avoided, by executing a Will or Revocable Trust to coordinate the decedent's affairs and in certain circumstances, leaving property in trust for the beneficiaries of the estate. For instance, leaving property in trust can protect the property from the claims of the beneficiary's spouse should there be a divorce, and at death a trust can protect the property from the claims of the beneficiary's creditors and any forced inheritance claim of a spouse. In addition, a trust can keep property out of the beneficiary's estate for Federal estate and state death tax purposes, and it can maximize eligibility for governmental resource payments such as Medicaid and SSI. Trusts can protect beneficiaries from these potential problems while making trust assets available for a beneficiary's health, support, maintenance, and education needs. If so desired, the trust can additionally provide for the similar needs of other members of the beneficiary's family. Such a trust can be created following death in only one of two ways: (1) by Will, which is also known as a Testamentary Trust; or (2) by Revocable Trust, as discussed below.

2. Beneficiary Designations

Beneficiary designations are another type of probate avoidance device. Due to recent changes in Kansas law which expanded the ability to use beneficiary designations, there are few types of property located in Kansas which cannot have beneficiary designations. These beneficiary designations are frequently termed "POD" (for "payable on death") or "TOD" (for "transfer on death").

As probate avoidance devices, beneficiary designations provide three key advantages over joint tenancies. First, because a beneficiary is not a co-owner, property having a beneficiary designation is not subject to the claims of the beneficiary, the beneficiary's creditors, or the beneficiary's spouse in the event of a divorce. Secondly, for the same reason, no signature of a beneficiary or a beneficiary's spouse is required to convey title to property and naming a beneficiary on property does not result in any adverse gift or income tax consequences. As discussed above, placing property in joint tenancy ownership with someone other than a spouse may constitute a taxable gift for federal gift tax purposes and prevent an interest in a personal residence from qualifying for the exclusion for income tax purposes of gain upon a sale.

As a final benefit of beneficiary designations over joint tenancy ownership, beneficiary designations generally allow for a contingent beneficiary in addition to a primary beneficiary, making it less likely that an individual's estate plan will be distorted if the primary beneficiary does not survive the individual. For example, if a parent has two children and names both of them as primary beneficiaries on property, the parent can name the primary beneficiary's children as contingent beneficiaries. Thus, in the event a primary beneficiary predeceases his or her parent, the predeceased child's interest would go to his or her children as contingent beneficiaries. Conversely, if property is held in joint tenancy ownership, upon a joint tenant's death the property automatically passes to the surviving joint tenants.

Beneficiary designations do not remedy all of the problems of joint tenancy ownership. For married couples, having a spouse as a beneficiary on property means the spouse will succeed to full ownership of the property upon the owner's death. This can subject property to potential spousal mismanagement and the claims of the spouse's creditors or those of a subsequent spouse. It can also place too much property in the surviving spouse's estate for Federal estate tax purposes and create Medicaid qualification problems. For single individuals, outright ownership in a beneficiary can subject the property to a beneficiary's mismanagement, to the claims of a beneficiary's spouse and creditors, to potential Federal estate tax or state death tax liability upon the beneficiary's death, and preclude the beneficiary's eligibility for governmental resource benefits such as Medicaid or SSI. As noted above, these problems may be minimized by placing property in trust under the provisions of a Will or Revocable Trust for the benefit of the beneficiary.

For unmarried individuals, or for married individuals who want a substantial amount of their property to pass to their children at the death of the first spouse, beneficiary designations also fail to provide for the coordination of the decedent's estate.

In addition, if beneficiary designations are part of an estate plan in which it is desired the beneficiaries share proportionately, the estate plan may be distorted unless the beneficiaries are named to share proportionately on each and every item of property that carries a beneficiary designation. Otherwise, a beneficiary's inheritance will depend upon the value of the asset on which he or she is named as a beneficiary and should the owner or the owner's legal representative (e.g., following the owner's incapacity) sell the property having a beneficiary designation, that beneficiary is disinherited.

3. Revocable Trusts

Revocable Trusts solve many of the problems characteristic of joint tenancy ownership and beneficiary designations. A Revocable Trust is an instrument in which a person, called a Grantor (or Settlor or Trustor), creates a trust and names either an individual (normally the Grantor) or a

bank or trust company as the Trustee. The Grantor transfers property to the trust, and the Trustee has the legal responsibility of managing, investing, and distributing the property in accordance with the provisions of the trust instrument. Revocable Trusts avoid probate because the title to property placed in the trust is in the name of the Trustee at the time of the Grantor's death, and the Trustee (or the named Successor Trustee if the Grantor was serving as Trustee during the Grantor's lifetime) has full authority under the instrument to sell and transfer the property.

Revocable Trusts are particularly advantageous as probate avoidance devices because, unlike joint tenancies or beneficiary designations, they can be used with virtually all types of property, no matter where it may be located. In addition, by providing for contingent beneficiaries under the trust provisions in the event any trust beneficiary predeceases the Grantor, they avoid the distortion of the disposition of the Grantor's estate which might otherwise occur through the use of joint tenancy or beneficiary designations. Revocable Trusts allow the Grantor to avoid probate, while reserving in the Grantor the right to control the trust property and amend or revoke the trust at any time.

Revocable Trusts have a few disadvantages, including: (i) a greater initial cost and effort in titling assets in the trust; (ii) possible adverse income tax consequences, although these are normally quite minor; (iii) lack of court supervision; and (iv) the potential for probate if the trust property is not properly titled in the trust. The risk of probate with Revocable Trusts is minimized with proper supervision of the retitling process and the use of universal assignment documents. While Revocable Trusts avoid probate, they have no estate or death tax planning advantage over Wills, nor do they normally significantly accelerate the disposition of the estate upon a decedent's death over property passing through probate, as the Trustee still must file required tax returns, sell property of the decedent not passing directly to family members, and settle the decedent's debts.

In addition to the foregoing advantages, there are two situations in which Revocable Trusts are particularly desired over other probate avoidance devices: (1) when the owner of property wants to avoid probate, but wants to leave assets in trust for beneficiaries following the owner's death; and (2) when the owner of property wants to avoid probate, but desires coordination of the affairs of the estate after death. These two situations constitute the majority of estate planning situations.

When an individual leaves assets in trust for beneficiaries, as noted above, asset protection planning can be achieved. The trust provisions normally protect the assets from the claims of the beneficiary's creditors or spouse, exclude all or a substantial portion of property from the beneficiary's estate for Federal estate and state death tax purposes, and preclude trust assets from being considered a resource for governmental resource benefits such as Medicaid or SSI. If there is no desire to protect the trust assets from the beneficiary's mismanagement, the beneficiary can be named as Trustee and be given authority to expend trust assets for the beneficiary's health, education, support and maintenance needs, as well as providing for such needs for the beneficiary's family members. If protection against mismanagement is desired, the Grantor would name a third party as Trustee.

Even if a Grantor desires to leave assets outright following the Grantor's death, a Revocable Trust is beneficial in that it can be used to coordinate the affairs of the estate after the Grantor dies. The Grantor may name a Trustee to file any required tax returns, pay any debts of the Grantor, sell any property that must be sold upon the Grantor's death, and distribute the remainder of the trust estate (including the personal effects) as directed by the Grantor in the trust instrument. As discussed above, joint tenancy ownership and beneficiary designations do not provide for coordination of affairs following death. A Will provides for coordination of affairs upon death,

but not without probate. Thus, a Revocable Trust is the only estate planning technique which both avoids probate and provides for coordination of the decedent's affairs and property distribution following death.

Conclusion

The simpler probate avoidance devices-joint tenancy ownership and beneficiary designations-have significant drawbacks. They can cause disruption in family harmony and do not coordinate the decedent's affairs or provide any asset protection for family members following the owner's death. They also may result in a distortion of the estate plan and create adverse tax consequences. In situations where an individual wants to avoid probate but also desires to minimize potential problems which can result from joint tenancy ownership and beneficiary designations, a Revocable Trust is normally the probate avoidance device of choice.

The foregoing discussion is an introduction to the use of joint tenancy ownership, beneficiary designations, and Revocable Trusts as probate avoidance devices. However, the estate planning process is very complex, involving many legal and tax factors which are often highly technical. It also involves balancing numerous, often conflicting, interests, and comparing the risks and benefits of numerous options and alternatives for which space did not permit a full discussion herein. Consequently, no probate avoidance device should be implemented without the advice of an estate planning attorney.

COMMON QUESTIONS AND ANSWERS ABOUT LIVING WILLS AND THE DURABLE POWER OF ATTORNEY FOR HEALTH CARE

WHO CONTROLS YOUR HEALTH CARE IF YOU ARE NOT ABLE TO MAKE DECISIONS YOURSELF? WOULD YOU LIKE TO MAINTAIN CONTROL?

Kansas statutes make two legal documents available to you to make sure your wishes are followed. One is known as a "living will" or natural death act declaration. The second is the durable power of attorney for health care decisions or health care power of attorney. You may also be able to execute documents which differ from statutory forms. These so-called "common-law" forms can be discussed with your lawyer.

What is a living will?
A statutory living will is a written statement of your wishes regarding your medical treatment if you are in a terminal condition. It is only effective if two physicians have determined you are terminally ill.

What is a durable power of attorney for health care decisions?
A durable power of attorney for health care decisions is a written document in which you authorize someone who you name (your "agent" or "attorney-in-fact") to make health care decisions for you in the event you are unable to speak for yourself. Health care decisions include the power to consent, refuse consent or withdraw consent to any type of medical care, treatment, service or procedure. In the document you can give specific instructions regarding your health care which will require the agent to make decisions in accordance with your direction.

What is the difference between a health care power of attorney and a "living will"?
Power of attorney can cover all medical decisions.
Statutory living wills only apply to decisions regarding "life-sustaining treatment" in the event of

a "terminal illness." A terminal illness does not include Alzheimer's Disease, dementia or coma. A durable health care power of attorney can be effective any time or, if you want, at any time you are unable to make or communicate a decision. The agent you appoint can make any decision you direct, including decisions about health care beyond those covered by your living will. For example, the agent under a durable power of attorney can make decisions about care if you are in a persistent vegetative state, but are not terminally ill.

Power of attorney appoints an agent
Through a durable power of attorney, you appoint someone to act on your behalf. That person can weigh the pros and cons of treatment decisions in accordance with your directions. Unless you limit the powers, the agent can hire physicians and other health care providers, decide where you will receive treatment, and make decisions about the full range of medical decisions from routine care to decisions about life-sustaining treatment.

Do I lose control by appointing an agent?
You can write your living will and your durable power of attorney to include specific limitations about anything you want to have done or want to avoid having done. You can express your wishes about whatever you care most about. You can terminate your health care power of attorney at any time by notifying your agent and health care provider. You can terminate the power of attorney verbally but it is best to do so in writing and to destroy the original document.

Why do I need a living will or health care power of attorney?
Without these documents, your wishes may not be followed. In some situations a guardian may be limited in making some decisions, especially those regarding life-sustaining treatment when you are in a vegetative state but not terminally ill. In addition, the guardian appointed by the court may have no idea what your wishes are. The existence of the document can relieve some of the stress or conflict that otherwise might arise if family or friends have to decide on their own what you would want done when you cannot speak for yourself.

Do I need both the living will and the durable power of attorney?
It is recommended you have both documents. The living will provides clear evidence of your wishes concerning medical care and treatment and will help ensure that the agent and physicians carry out your wishes. The durable power of attorney for health care gives your agent the authority to take action on your behalf and to carry out your directions for health care, without the delays of court proceedings.

How do I make a living will and durable power of attorney for health care?
The legislature has adopted statutory forms for both the living will and the durable power of attorney. A lawyer can draft a document which specifically incorporates your wishes and may be more detailed. Take time to consider all the possibilities and seek competent advice so the documents you develop meet your special needs.

Once I have the documents what do I do?
Even as you draft the documents you should talk about your values and wishes with your physician(s), anyone you will appoint as an agent or alternate agent, and those who are close to you. You should give a copy of the documents to all of your physicians, your agent under the durable power of attorney, and your family or friends. If you retain the originals tell someone where the papers can be found. Place the originals in a secure place where someone can access without court intervention.

Remember, a Living Will and Durable Power of Attorney for Health Care Decisions provide you a way to maintain control of your health care.

COMMON QUESTIONS AND ANSWERS ABOUT PROBATE

Probate is a court procedure where the validity of a will is proved or disproved. It involves all estate administration proceedings. When a person dies, all property, other than property passing directly to others (such as property held in joint tenancy, life insurance proceeds and retirement plans payable to a named beneficiary), may be subject to a probate proceeding. An estate is generally probated in the county where the deceased owned property. If property is located in another state, additional proceedings are sometimes necessary in that state. There is no natural right to inherit property. This right exists solely as granted by statute. Kansas law provides for the probating of estates to protect all interested parties.

Why is probate necessary?

To determine if the deceased left a valid will.
To appoint an executor or administrator (surviving spouse, adult child, bank or trust company) to administer the estate of the deceased.
To collect and determine all property and assets of the estate.
To protect the property of the estate.
To provide a method of converting assets to cash for distribution to beneficiaries or payment of creditors.
To pay existing taxes and debts in a timely manner.
To determine those entitled to share in the estate and to distribute the property to the proper parties.
To transfer legal ownership of real estate and other property.
To keep ongoing businesses running smoothly during the transfer period.
To extend the court's protection to the person who settles the affairs and distributes the property of the deceased.

There may be special circumstances where all persons interested in an estate, by agreement of the parties and after review with their lawyers, conclude that formal probate proceedings are unnecessary. However, anyone who deals with the deceased person's property without qualifying as an executor or administrator can be held personally liable for his or her conduct and should be fully advised by counsel before acting.

What is involved?

The will usually names an executor to manage the estate assets. If there is no will, the court will appoint an administrator.

The executor or administrator, normally under the guidance and direction of a lawyer, is personally responsible for the proper handling and settlement of the deceased person's estate.

The executor or administrator will usually be required to:

- Notify heirs and creditors of the probate proceedings.
- Take possession of, inventory and preserve the probate assets of the deceased.
- Collect all income, such as rents, interest and dividends, demand and collect all debts, claims and notes due.
- Manage the business of the deceased.

- Determine the names, ages, residences and degrees of relationship of all heirs and next of kin of the deceased.
- Complete any pending lawsuits in which the estate of the deceased has an interest.
- Determine, prepare returns for and pay all state and federal inheritance, estate and income taxes.
- Pay the valid claims of creditors of the deceased and, when necessary, sell property to raise funds to pay claims, taxes, and expenses of administration.
- Transfer a deceased's title to real and other titled property to his or her heirs.
- Distribute all remaining assets to the proper persons.

Probate procedures in Kansas are not complicated, but they require some experience. To achieve the desired results they must be handled with an understanding of the underlying legal principles. These proceedings may require preparing and filing numerous legal documents; giving or publishing notices; holding court hearings; securing appraisals of property, preparing income, gift and estate tax returns; providing an accounting of funds; distributing property and securing the final discharge of the executor or administrator by the court.

What is the role of the court?
All probate proceedings are subject to the jurisdiction of the district court. With the exception of certain actions, estates administered under the Simplified Estates Act and Informal Administration Act, the acts of the executor or administrator are subject to the scrutiny and approval of the court. Final determinations are made by the court including payment of debts that exceed $1,500, lawyer fees, executor or administrator fees, and orders of final distribution of the assets. Juries are not used in probate matters.

How long does probate take?
The initial step, filing a petition, must be completed within six months after the date of death. Appointing an executor or administrator usually takes four to five weeks from the date the petition is filed.

Since the problems of each estate differ, no accurate time schedule can be given for the length required to probate the estate. However, no estate with assets amounting to more than the legal allowance and debts, taxes and costs may be closed before six months after the date of death. Persons having knowledge and access to a will may offer it for probate at any time within six months following the death. Creditors have four months after actual notice to file claims against the estate. The filing of state and federal death tax returns may be required and tax payments are due no later than nine months after the date of death.

What property is not included in the probate process?
Not all property owned by the deceased is subject to probate. For example, life insurance will pass directly to the designated beneficiary and does not require probate unless the beneficiary is the insured's estate or executor. Title to joint tenancy property with right of survivorship pass automatically to the surviving joint tenant(s), subject to possible tax liability. A bank account with a "pay on death" provision will pass directly to the named party. Transfer on Death provisions are available with respect to securities, titled vehicles and real estate. Property not subject to probate will not pass under the person's will, which may impair or destroy the deceased person's wishes regarding disposition of his or her property.

What taxes are involved?
Every estate may be subject to two types of death taxes, depending on the total value of all assets

including the taxable estate and to whom the assets pass. The taxable estate is not the same as the probate estate. The taxable estate includes both probate and non-probate assets.

One type of death tax is the federal estate tax, based on the value of the assets in the taxable estate. The federal estate tax is a graduated tax that is levied on the net estate after allowing for certain deductions and exemptions. The exemptions are large so many estates will owe no tax, however that determination should be made by an attorney that is familiar with federal and state estate taxes.

The second type of death tax is the Kansas inheritance tax. This tax is based on the value of the assets received from the deceased and the heirs' degree of kinship to the deceased. However, a Kansas inheritance tax may be payable even though no federal estate tax is due.

Another tax is the federal and state fiduciary income tax that is based on income and expenses generated from the probate estate assets. This tax is very similar to the federal and state personal income tax.

The obligation to prepare and file tax returns and pay the appropriate tax liability may exist even if the deceased left no probate estate. This is due to the fact that jointly held property, life insurance and certain types of transfers by the deceased prior to death are subject to taxation by the state and federal governments. Due to the complexities involved, an executor or administrator should not attempt to draft the necessary returns, compute the taxes due nor meet the necessary filing requirements without the supervision and guidance of a lawyer that is familiar with federal and state estate taxes.

Kansas real estate cannot be transferred with clear title after the death of an owner or co-owner without obtaining a Kansas Inheritance Tax Waiver, which is filed with the Register of Deeds in the county in which the property is located. The only exception from this requirement is when the deceased died more than 10 years before the transfer.

What are the fees and costs?
The fee of the executor or administrator and lawyer are not fixed by any law or court rule. They must reflect the fair value of the services actually rendered in relation to the size of the estate. The fees of the executor or administrator and lawyer are subject to the approval of the probate court.

The estate administration costs include court costs which are set by law, publication costs, and bond premiums if a bond is required by the court.

What about small estates?
The laws of Kansas provide that when the deceased leaves a spouse or minor children, a simplified proceeding may be used when:

> the estate is made up entirely of personal property
> the estate does not exceed the amount of exempt property
> the estate does not exceed the maximum family allowance of $25,000. It's called a "Refusal to Grant Letters of Administration." This proceeding can also be used by a creditor where the deceased person's estate consists of real and personal property that does not exceed $25,000 and when there is no claim for family allowance by a surviving spouse or minor children.

The availability of the "Refusal to Grant Letters of Administration" process can be determined by the lawyer and the executor or administrator at the time of the initial conference. Probate can be avoided if the estate contains no real property and the value of the estate is less than the total value of all demands against the estate. Any person possessing a will may then file it with an affidavit. If assets are discovered later, the will can then be probated and the assets distributed according to the will. If the deceased had no will and left only real estate to the surviving spouse and other family members, a "Determination of Descent" proceeding may be instituted at any time six months after death. This proceeding takes about 30 days to complete and is often used when reasons to probate administration do not exist.

Even if a "Refusal to Grant Letters of Administration" or a "Determination of Descent" proceeding is used, there may be Kansas Inheritance Tax and federal estate tax filing requirements.

What should be done?

If someone close to you has died, it is suggested that nothing be done to disturb any of the property of the deceased unless it is necessary to protect it from being lost or destroyed. Shortly after the death, a lawyer should be contacted to discuss the matter with those close to the deceased. In general, the surviving husband or wife should make the initial contact if he or she resided with the deceased. In other situations it is recommended that the closest relatives contact the lawyer.

The lawyer will provide advice, determine whether probate proceedings will be required, and explain the procedures involved. If you possess a will of a deceased person, you should give it to the lawyer at the first consultation.

Attending to the details of a probate proceeding may be a complex, time-consuming task, and it may be necessary for relatives or close friends to face this task in a time of grief and trauma. A lawyer has the technical expertise to smoothly handle the necessary legal procedures and relieve the bereaved of this burden.